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In the
Supreme Court of the United States

October Term, 1963

No. 557

JOSEPH W. DICK, et al, *Petitioners*,

v.

ROBERT S. MCNAMARA, Secretary of Defense, et al,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered May 16, 1963.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is unreported and attached

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*Other petitioners not named in the caption:
THOMAS F. VAN ARSDALE, MICHAEL J. McCONNELL, ROBERT A. McKINNEY, EDWARD J. GAYTON, LAFAYETTE F. SAWYER, WALTER G. HARDEN, MARION R. BONNEVILLE, JR., BERNARD R. SMITH, AUGUSTINE J. BORODY, COLUMBUS J. PAGE.

Other Respondents not named in the caption:
JOHN W. MACY, JR., Chairman of the United States Civil Service Commission; L. J. ANDOLSEK, ROBERT E. HAMPTON, Members of the Commission.

hereto as Appendix A. (p. 21). The Order of the United States District Court for the District of Columbia is set forth in the Certified Record, page 174.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 16, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

Whether the third proviso of Section 12 of the Veterans Preference Act of 1944, which, in cases of transfers of functions, requires the transfer of Federal employees with their transferred functions before the addition of new employees to fill their positions, is to be construed to apply to all transfers whether intra- or inter-agency or is to be limited only to "major government reorganizations" requiring Congressional action or approval and affecting only transfers between Departments and Independent Agencies, contrary to the long standing interpretation of that section by the Navy and the Civil Service Commission (Departmental Circular No. 740, Jan. 12, 1954) requiring preservation of the retention rights in transfers *within* as well as between Federal Departments or Independent Agencies.

Whether the Navy can, contrary to the decisions of the Supreme Court in *Service v. Dulles* and *Watson v. U.S.* refuse to follow its own regulations, NCPI 170.9-4, and those of the Civil Service Commission, Dep. Circular 740, January 12, 1954, thus depriving its employees of the right to transfer when the duties of their positions or units are identifiable with work that is to be transferred to a different location within a shipyard, or whether the Navy can refuse to transfer such employees and separate them through reduction in force.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are Section 12 of the Veterans Preference Act, 58 Stat. 390, 5 U.S.C. 861 (1944), which provides:

SECTION 12:

In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided*, That the length of time spent in active service in the armed forces of the United States of each such employee shall be credited in computing length of total service: *Provided further*, That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings: *And provided further*, That when any or all of the functions of any agency are transferred to or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions.

Naval Civilian Personnel Instructions ~~January 12, 1951, set forth in Appendix C, p. 40~> . . . . .

Civil Service Commission, Departmental Circular 740, ~~Instruction 170 set forth in Appendix B, p. 35~> . . . .

STATEMENT

The petitioners, who were the plaintiffs in the District

Court, where they sought and obtained a declaratory judgment (R. 174), were selected by the Navy and the National Association of Shop Analysts and Schedulers as a representative group to test before the Civil Service Commission the sole question of the application of the transfer of function proviso of Section 12 of the Veterans Preference Act of 1944 (R. 11). These employees (from Norfolk and Philadelphia) held the position of Naval Shop Analyst and Scheduler in the shop planning sections (hereinafter sometimes referred to as A & S). They constituted some 2,200 employees in the eleven Navy Ship Yards operated in the United States. (R. 6) Petitioners sued for themselves and the members of the National Association of Shop Analysts and Schedulers all of whom were similarly affected by an order issued by the Navy November 17, 1959.[1]

Petitioners contended that this order was unlawful because it transferred the functions being performed by petitioners and failed, contrary to the law and regulations then in effect, to transfer the petitioners with the work of their sections before any reduction in force was processed.

"Transfer of function" in November 1959 was governed by the third proviso of Section 12 of the Veterans Preference Act of 1944, and the then existing regulations and instructions of the Civil Service Commission and the Department of the Navy.

Section 12, Veterans Preference Act of 1944, 58 Stat. 390, 5 U.S.C. 861 (supra, p. 2) provides in pertinent part:

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[1] "There are eleven naval shipyards located along the Pacific and Atlantic coasts. Navy ships come to the shipyards for conversion, repair or alteration. The shipyard is divided into departments: The Production Department includes the shops which are each in separate buildings physically separated from the Planning Department. There are usually about 17 shops, e.g., electrical, paint, woodwork, sheet metal work, structural, etc. The number of employees in each shop may run from 60 to 3,000 in a large structural shop (CSC 182). (Paragraph 1, R. 13)

"Section 12. In any reduction in personnel in any Civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations . . . Provided . . . and provided further, that when any or all of the functions of any agency are transferred to or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

Furthermore, in November 1959, the Civil Service Commission had in effect an instruction issued in 1954 which specifically required transfer of employees (when functions were transferred) within an agency i.e. between departments, divisions sections or smaller organizational units. The pertinent part of this ruling follows:

"The Commission has ruled that Section 12 of the Veterans' Preference Act and thus Section 20.8(a) of the Civil Service Regulations also apply to transfers of functions within a Federal Department or Independent Agency.

. . . . . .

This action of the Commission defines "agency", as used in the third proviso of Section 12 of the Veterans' Preference Act and in Section 20.8(a) of the Civil Service Regulations. An "agency", in this context, could be an entire independent establishment, a bureau, branch, division, section, or smaller organizational entity. The applicability of Section 20.8(a) depends upon a judgment as to whether, in conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organizational entity. If such is found to be the case, then the incumbent or incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions prior

to any reduction in-force action which might otherwise affect them." [Departmental Circular 740, Appendix C, p. 46]

In November 1959 there were in effect Naval regulations of many years standing which specifically governed a transfer of functions such as occurred here. The transfer regulations were made specifically applicable to transfers from one location to another within a shipyard, and the term "function" was correlated with the term "work" and "duties". The pertinent parts taken from Instruction 170, Reductions-in-Force, NCPI 1703-4 (Appendix B, p. 35) follow:

"a. *** When functions are transferred from one location to another all of the Retention Group I, II and III employees involved shall be transferred with the functions. ***

b. *** The same criteria shall apply when functions are transferred to a different location within the same activity. ***

c. Identifying positions with transfer of functions.— It is necessary to make a determination as to which, if any, positions or units are identifiable with work that is to be transferred to a different location. This determination must be made whether the work is being transferred to a different location within the activity, to another naval activity, or to a different service in the Department of Defense. ***

(1) Certain duties of one or more positions are to be transferred while the unit performing the functions to be transferred will remain intact to perform remaining functions. If the majority of the duties of a position are to be transferred to another service or naval activity, the incumbent will be identified with the transfer of functions. ***

(2) Employees whose positions are being abolished because the function is being transferred to another Serv-

* A naval shipyard is a naval activity (Appendix B, p. 35)

ice or naval activity enjoy transfer of function rights even though no additional personnel are required by the Service or activity acquiring the function.

"(3) When the majority of an employee's duties are being transferred to more than one location his transfer or function rights are dependent upon the planned location of the controlling duties. . . ." ***

The District Court granted the employee's Motion for Summary Judgment declaring, as a matter of law based on the existing law and regulations, that the petitioners were engaged in a function and that the function was transferred. The Court of Appeals disagreed. The facts are not in dispute.

The sections staffed by A & S were established beginning in 1950, and charged with a special assignment developed from the recommendations of a private consulting firm that had made an extensive year-long survey seeking to modernize the shipyards. The objective was to establish a new program which would utilize "the latest production control techniques" (R. 155). A special group was selected and trained and undertook the new task of providing a detailed breakdown of work at the shop level. (R. 156). Employees in this group were given the rating of Analyst and Scheduler.

In essence the 2200 employees in these sections were engaged in precise job analysis and preparation of line detail instructions to the various shops and sections throughout the Production Department. This function was tied in with routing, scheduling, standards, material control, and cost determination. The result was to eliminate delay by permitting the leadingmen and craftsmen to proceed immediately with their portion of a job without stopping to study specifications. In other words, the scope of the section's assignment or function was to provide specific step by step instructions and to keep all facets of a job coordinated and moving toward scheduled completion dates. (R. 157, 159).

In November 1959, by order of the Navy, the work of the sections staffed by Analysts and Schedulers was lifted and moved from the Production Department to the Planning Department. These departments existed in each shipyard and were physically separated by distances of one half mile to a mile. They were also separated organizationally. The group shop masters reported through the Production officer to the Commander of the Shipyard, and the Head of the Planning Department reported through the Planning Officer to the Commander.

The Analysts and Schedulers were not moved with their sections. The rating was abolished and all were reached in a Reduction-in-Force. The Planning Division proceeded to restaff in order to continue the work formerly being done by the petitioners.

The Navy in effecting the transfer ignored its own regulations and those of the Civil Service Commission. It moved the work and recruited an additional staff to perform the functions.[2]

The Analysts and Schedulers immediately (in 1959) protested the action as unlawful and have continued to protest in every available forum. They maintain that they should have been transferred to the Planning Department with the function they were performing. Petitioners urged the application of the statute and the regulations so that, if after transfer it were necessary to reduce the number of

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[2] The government in attempting to put a better light on their actions emphasized that many A & S employees ended up in P & E. While this is true, it points up the error. The law and regulations provided a prescribed method covering transfer which was intended to place the employee whose work was transferred on an even footing with the employees in the new location who were now to perform their work. It is no answer to say that picking one here and there on a selective basis is a substitute for the enjoyment of established and enforceable rights.

employees, that they would be put into competition with the employees in the Planning Division in determining, by the statutory test of Section 12, who would be retained or eliminated. The essence of their protest is that they were all reached in a Reduction-in-Force proceeding which was processed solely in the Production Department and that the employees in the Planning Department, where their functions were now being performed, were untouched.

The Analysts and Schedulers throughout all of the Shipyards appealed to the Civil Service Commission. By agreement between the parties and with approval of the Commission a cross section of affected employees were selected and the first Commission hearing was before the Chief of the Appeals Hearing Office in Washington where sample testimony was taken (R. 21-133). All other appeals were held in abeyance.

There was little or no dispute as to the facts. (R. 87). It was agreed that the work performed in the A & S sections was a clearly identifiable and substantial course of work, that it was new as of 1950 (R. 71, 72), that special training had been given to A & S employees, that the work was transferred and was thereafter being carried on in the Planning & Estimating section of the Planning Division, and that A & S employees were assigned to instruct P & E employees on how to perform the various duties. (R. 13-15).[1]

[1] To give an idea of the comparative size and importance of A & S and P & E, a chart was introduced (R. 108, 109) showing that the A & S duties in the Production department required 2000 employees and utilized over $17,000,000 or 51% of the Planning dollar. This compares with $7,000,000 and 22% for P and E. Testimony showed that 90% of the time of A & S was devoted to preparing detailed line item instruction before the transfer. (R. 92). Plaintiff Gayton testified that he was assigned to a unit at P & E where 11 of 45 employees after the transfer spent 85% of the time in performing the same line item work as before the transfer (R. 68, 70).

The appeal was denied and further appeal was taken to the Board of Appeals and Review. The Commission itself took the appeal from the Board and decided that because there was a relationship between the nature of the detailed planning done by Analysts and Schedulers and the general planning done in the Planning Division that therefore a function had not been transferred. This was the sole basis of the adverse decision and announced a new limitation not before published.[5] The Commission expressly refrained from passing on any of the other questions presented, thus refusing to adopt an alternative basis of denial reflected in the opinion of the hearing examiner. (R 172)

On appeal to the District Court where the only substantial issue presented was whether the Sections staffed with Analysts & Schedulers were engaged in a "function," the court disagreed with the Civil Service Commission and in judgment for plaintiffs found that the defendants had not complied with the law in that a). plaintiffs were engaged in a function and b). the function had been transferred.

The government appealed to the Circuit Court of Appeals and again the only substantial questions were whether the Navy was bound by its own regulations and whether the Analysts and Schedulers were engaged in a "function" within the meaning of the statute, the petitioners taking the position with respect to the function that on the undisputed facts the Analysts and Schedulers were performing a new and different function, and in the alternative a function, under the third proviso, was no less a function because the work and duties comprising a function were related to or even identical with the work and duties of the employees in the unit to which functions were transferred.

The Court of Appeals for the District of Columbia with-

[5] The District Court decision was in response to Cross-Motions for Summary Judgment

out benefit of brief or argument or precedent on the point, undertook to define the terms "function" and "agency" by construing them as though the Veterans Preference Act of 1944 and the Reorganization Act of 1939 were to be considered in parti materia. Function was to be given the limited meaning of "authority, powers and duties when expressly authorized by law". Agency was limited in scope to statutory Departments and Independent Agencies. At no point does the Court of Appeals recognize the existence of the applicable Navy regulations.

REASONS FOR GRANTING THE WRIT

I

Aside from the fact that the Court of Appeals was clearly wrong there are immediate and important reasons why this Court should now finally complete its interpretation of the remaining heretofore unresolved transfer of function proviso of Section 12, and determine finally the scope of the protection given to transferred veterans under the Veterans Preference Act of 1944.* The far reaching effect of the lower court's decision, in addition to its impact on the frequent consolidations and reorganizations within agencies, is seen in the ever increasing movement of sections and branches out of Washington, D. C., as well as in the widespread growth of collective bargaining in government. Consequently, the number of Federal employees involved in transfers is rapidly increasing and protection of transfer rights are now of concern alike to veteran and organized federal employees.

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* The Court of Appeals recognized the importance of the decision (infra p. 22): "This is a civil service case, presenting important issues concerning the interpretation to be given the "transfer of functions" provision of Section 12 of the Veterans Preference Act of 1944; 58 Stat. 390, 5 U.S.C. Section 861 (1958) [Apparently 1958 should read 1944.]

The unique decision of the Court of Appeals, so distinctly at odds with any interpretation urged by any of the parties, has created widespread confusion which can only be settled by this Court. The provisions of Section 12 which spell out the retention rights of veterans in a reduction of force is the very heart of the Veterans Preference Act. With the exception of the proviso at issue in this case, this Court, in 1951, finally adjudicated the other provisions of Section 12, *Elder* v. *Brannan*, 341 U.S. 277, 284, 285. There remains then the settlement of the interpretation of this final, but vital, proviso to give certainty to both the government and the federal employees in the application of the retention provisions whenever employees are transferred. The question of the interpretation of the proviso has not been, but should be, passed upon by this court.

Furthermore, the judgment of the Court of Appeals should be reviewed because it is in direct conflict with this Court's holding in *Service* v. *Dulles*, 354 U.S. 363, and *Watson* v. *U.S.*, 355 U.S. 23, for it ignored entirely the employees' right to the protection of agency regulations.

II

For the veteran, and now for the organized government employee,[7] it is of the utmost importance that management not close shop, separate the employees and then transfer the work to another location to be performed by newly hired non-veteran and non-union employees. If the decision below stands then only employees transferred by statutory authority will be protected and the many thousands who are transferred annually due to intra-agency mergers, con-

[7] E. O. No. 10988, January 18, 1962, 27 F.R. 531—"Employee-Management Cooperation in the Federal Service".
Section 12 by its terms applies to all "competing employees" —veterans and non veterans.

solidations and re-locations will lose their preferential status.

It is clear from the legislative history of the Veterans Preference Act that Congress was determined to prevent the occurrence of the kind of treatment given the petitioners, that is, moving the work and leaving the veterans "out in the cold." (Testimony Congressman Starnes, infra p. 27).

Congress understood very clearly the mechanics of protection in event of transfer, for it provided that no new employees be hired "from any source" until the old employees were first transferred. Thus, the Veterans Preference Act of 1944 imposes on management a check or limitation in its freedom of action. Congress realized that unless the Act were tightly drawn, efforts would be made to avoid compliance. Consequently, in its desire, during wartime, to guarantee the protection of the preferential status of the returning Veterans, Congress anticipated and, presumably effectively, plugged a loop-hole which might have led to easy evasion of the Act. They did this by enacting the third Proviso of Section 12.[8] In essence Congress provided that when the work of a shop was transferred, the employees would transfer with the work. This prevented closing shop in one place and opening in another with new employees, who would be non-veterans performing the transferred duties. At issue is whether this proviso shall remain effective in fact as well as in ~~substance.~~ *letter.*

In 1954 the Civil Service Commission recognized formally in Departmental Circular 740 (R. 138) that what Congress had in mind was movement of one or more employees from one "organizational entity" to another.[9] The term agency

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[8] This Court recognized that the purpose of this proviso was to strengthen Veterans Preference, *Elder v. Brannan*, 341 U.S. 277, 284, 285, 95 Led 939, 946.

[9] The language of Section 12 was suggested to Congress by the Civil Service Commission (S. Rep. 907, 78th Cong. 2nd Sess.)

was thus defined broadly and in keeping with the meaning of the word as commonly used in referring to any governmental unit.[10]

The Navy and other Departments, in the years prior to 1959, accepted the broad definition of agency. The Navy in NCPI-170.9-4 (Appendix B. p. 35) significantly spelled out in clear language that the transfer of function regulations included transfers from "one location" within a shipyard to another location within a shipyard. (infra p. 36).

Other than the 1954 definition of "agency" neither the Commission nor courts prior to this case attempted to define or apply the terms "agency" or "function". Nor is there any reference to the meaning of these terms in the legislative History[11] of the Veterans Preference Act of 1944.

Hence on the basis of the existing applicable law and regulations existing in November, 1959 the action of the Navy in refusing to transfer the petitioners and the other Analysts and Schedulers was clearly unlawful. It is this refusal to abide by the applicable law and regulations that forms the basis of the petitioners' complaint (R. 5, par 12), and the District Court, recognizing the violation, granted judgment for petitioners. (R. 174).

III

Without benefit of brief or argument from any of the participants, and without the slightest hint in the legislative history, and, with what must be utter amazement by those who have been administrating the Veterans Preference

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[10] Cf., Administrative Procedures Act-Definitions 5 U.S.C. 1001(a).

[11] Report 1289, 78th Cong. 2nd Sess. accompany H.R. 4115. 90 Cong. Rec. 3505 (1944). S. Rep. 907-78th Cong. 2nd. Sess. Hearings before Senate Committee on Civil Service on S. 1762 and H.R. 4115, 78th Cong. 2nd Sess. p. 8-9.

Act for 19 years, the Court of Appeals suddenly discovered that the Veterans Act of 1944 is controlled by concepts pertinent to the Reorganization Act of 1939. (infra p. 25) Petitioner is prepared to show to the Court that Congress did not intend to handicap and restrict the administration of the "transfer of function" proviso as required by the Court of Appeals.

The appeals court would give to the term function, the meaning of "authority, powers and duties" when "expressly authorized by law" (infra p. 25), instead of the common ordinary meaning which is the work and duties that make up the functions being performed by an organizational unit.[12] To limit the transfer proviso solely to transfers resulting from statutory action authorizing reorganization pursuant to the Reorganization Act of 1939 is to take from all the thousands of employees the rights they heretofore possessed and to arbitrarily discriminate between inter- and intra- departmental transfers.

Apart from the legislative history of the Reorganization Act of 1939 and the Veterans Preference Act of 1944 which reveal two entirely different purposes and objectives, it is obvious from a consideration of the language of the Acts that the concepts recognized by the Court of Appeals find no common bottom in the legislative scheme of each. The Reorganization Act pertained solely to transfers and consolidations that could be made only by statutory authority; that Act did not define its terms, and in any event, was to have no effect after January 21, 1941.[13] Certainly, the Reorganization Act of 1939 can have no bearing on the interpretation of the Veterans Preference Act of 1944 unless it is arbitrarily assumed that the third proviso of Section 12 was to apply only to inter-agency transfers result-

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[12] Webster's New Twentieth Century Dictionary defines "function" as "3. occupation, employment."

[13] 53 Stat. 561-65, approved April 3, 1939.

ing from statutory reorganization. Nowhere is there support for such congressional intent. Yet the Court of Appeals makes this assumption. In a footnote (infra p. 28) it stated: "It would perhaps have been surprising if the Act had attempted to deal with intra-agency transfers"[14] — this with reference to the Veterans Preference Act. It is this unwarranted interpretation which so drastically limits the scope of the third proviso.

IV

It is public knowledge that there is extensive activity underway to move Federal offices out of Washington, D.C. whose efficient operation is not dependent on a location in the Capital. The Budget Bureau released on July 24, 1963 criteria for decentralizing or retaining Federal activities in the Washington Area, (Joseph Young in the Evening Star, July 25, 1963, p. 2; Jerry Klutz, Washington Post July 25, 1963). There are many factors which are causing a rapid increase in transfers; population growth is one cause, automation another.

The Bureau of the Budget asked Departments and agencies to report by September 8, 1963, on moving plans, if any. It is significant that the Bureau is thinking about intra-agency and not inter-agency transfers which would require legislation.

The Federal Employees Digest for June 24, 1963, reports that "with an increasing number of Federal agency functions being transferred to other cities and even more transfers contemplated in the future, the CSC [Civil Service Commission] feels that it is essential that a legal determination be made as to job rights in agency transfers."

[14] It would be strange indeed if Congress intended to protect the veteran only while his unit was being transferred to a new Department head or Independent Agency, and thereafter leave him without protection during the intra-agency adjustments that would ordinarily follow.

It is common knowledge that organizational entities are constantly being merged, transferred and consolidated all within Departments and Independent Agencies, and without special statutory action. With these transfers and with the acceleration of intra-agency transfers the limiting effect of the Court of Appeals decision will be costly in terms of job security for many thousands of Federal employees.

V

The position of the Court of Appeals is not consistent with its liberal approach taken in an earlier case as to the intent of Congress in adding the third proviso,[15] and it directly conflicts with the position of the Navy and the Commission in two cases now pending in the Court of Claims.[16] Prior to this case, the only Court of Appeals decision where the "transfer of function" proviso was at issue was *Feldman v. Herter*, 107 U.S. App. D.C. 239, 276 F2d 485, where the Court liberally construed the proviso. In the *Feldman* case the Court held that a clerk of a military court in Germany was entitled to follow the function when his job was abolished and the work of the court transferred to the State Department, although the State Department insisted it had no job of the exact same grade and salary.[17]

Currently at issue in the Court of Claims are two cases involving intra-agency transfers. The Navy and the Commission are defendants in each case. In one case, *Colbath v.*

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[15] Nor is it consistent with this Court's analysis of the purpose and intent of the Veteran's Preference Act expressed in *Mitchell v. Cohen*, 333 U.S. 411, 418, 419 92 L.Ed. 774, 780.

[16] The opinion is, of course, in conflict with the position of the Navy and the Commission in this case, for it was acknowledged by them that the proviso is applicable to transfers within an agency.

[17] A similar liberal attitude was reflected in the determination by the Court of Claims in *Kirby v. U.S.* (Ct. Cl.) 155 F Supp. 240

U.S., Court of Claims 399-59, the government insists that a true transfer of function takes place where the related work of a small segment is consolidated with a central office.[18] In the other case, *Barnes v. U.S.*, Court of Claims No. 335-61, the government takes an opposite position and insists that where a smaller related unit is merged with a larger unit a transfer does not take place. In both cases all parties agree that the transfer of function proviso applies to intra-agency transfers.

These conflicting positions in the light of the vastly expanding movement of government units make it imperative the meaning of the proviso be settled.

VI

The refusal of the Court of Appeals to follow the rule of this Court in accepting the existing regulations of the government agency as binding upon the parties and creat-

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[18] In this connection, in a brief filed March 1961 by the Navy in the Court of Claims in the *Colbath* case (still undecided) the Navy quite properly stated: "It must be pointed out also that the underlying purpose of a transfer of function is to promote a greater efficiency of the Government service by placing together related functions so they can operate in a consolidated fashion. Certainly this cannot be accomplished if the consolidated functions are allowed to retain all of their separate and independent characteristics. Such would merely constitute the moving of a function from one location to another without accomplishing any greater efficiency than what was had prior to the movement, and thus the sole purpose of the transfer would be defeated. This does not mean, however, that the function which is transferred has completely lost its identity and has consequently been abolished, but rather that said function has been integrated with a related working function at one location allowing both to continue operating in a more efficient and economic manner."

[19] The Civil Service Commission after this Court's decision in *Service v. Dulles* and *Watson v. U.S.* issued instructions making the agency regulations enforceable. (R.192)

ing a right in the employee to the protection given by those regulations constitutes a substantial threat to the security of all federal employees. This Court in *Service v. Dulles*, 354 U.S. 363, and *Watson v. U.S.*, 355 U.S. 23, held that agency regulations create enforceable rights. Nevertheless, in the face of Naval Civilian Personnel Instruction covering Reduction-in-Force, (Transfer of Functions NCPI 170.9-4 (Appendix B. p. 35), the Court of Appeals denied that the law governs transfers which take place from one location within a shipyard to another. That Court also ignores NCPI 170.9-4c which specifically applies function as meaning all or part of the work being performed. In fact, because the regulations of the Navy were so precise and so obviously pertinent and controlling, the Court simply refused to mention them. This, in spite of the fact that, from the first Civil Service appeal, the petitioners insisted on the government complying with the Supreme Court's ruling in *Service v. Dulles*, and *Watson v. U.S.*, (*supra*).

Petitioners submit that the Respondents are bound by the applicable regulation, and insist that nowhere; contrary to the Court of Appeals opinion, are there any regulations or statutory provisions which permit the Navy to make transfer rights depend upon employees meeting special tests or examinations[20] or upon whether a transferred employee gains a few cents pay differential. The statute

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[20] Nevertheless, throughout the opinion, the Court seems to have mistakenly assumed that the passing of a test (supra p. 23) is a matter at issue in this case. It is not, but if it were there is nothing in the record to support the Courts factual assumptions. It is not in dispute that approximately half of the petitioners and of all Analysts and Schedulers for whom this suit was brought passed the test so that the Court is mistaken in its flat statement that all petitioners had failed and the Court is equally mistaken in its assertion that passing the test assured transfer to P & E (R. 63, 64).

imposes no test or conditions. Certainly as the Commission and the Court of Appeals recognized in Feldman v. Herter, (supra p. 17), a place must be found for transferred employees whether or not a position of precisely like status and pay is available. In any event, the fact is not disputed that A & S employees and P & E employees were in the same grade and that some Analysts and Schedulers received more pay per hour than their counterparts in P & E. Further, these particular grounds were specifically eschewed as a basis for the final decision by the Civil Service Commission (R. 172) and it was improper for the Court of Appeals to go behind this decision to adopt an unsupported arbitrary assumption of the Hearing Examiner.

The effect of the appeal Court's decision is to deprive the nearly 2000 employees bound by agreement to the final adjudication of this action of the right to rely and enjoy the benefits of existing agency regulations.

CONCLUSION

For the foregoing reasons, the petitioners respectfully ask that their Petition for Certiorari be granted.

Respectfully submitted,

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REPRINT

(Appendix A)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,216

ROBERT S. MCNAMARA, Secretary of Defense, et al.,

APPELLANTS,

v.

JOSEPH W. DECK, et al., APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided May 16, 1963

Mr. Edward Berlin, Attorney, Department of Justice, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Acting Assistant Attorney General Guilfoyle* and *Messrs. David C. Acheson*, United States Attorney, and *Sherman L. Cohn*, Attorney, Department of Justice, were on the brief, for appellants. *Mr. Morton Hollander*, Attorney, Department of Justice also entered an appearance for appellants.

Mr. Donald M. Murtha for appellees.

Mr. Warren E. Miller filed a brief on behalf of The National Association of Government Employees, as *amicus curiae*, urging affirmance.

Messrs. Bertram G. Davis and *John S. Mears* filed a brief on behalf of the American Legion, as *amicus curiae*, urging affirmance.

Mr. Elmer G. Neumann filed a brief on behalf of American Federation of Government Employees, as *amicus curiae*, urging affirmance.

Before WILBUR K. MILLER, FAHY and WASHINGTON, Circuit Judges.

WASHINGTON, *Circuit Judge*: This is a civil service case, presenting important issues concerning the interpretation to be given the "transfer of functions" provision of Section 12 of the Veterans Preference Act of 1944, 58 STAT. 390, 5 U.S.C. § 861 (1958). Plaintiffs-appellees, employees of the Department of the Navy rated and described as "Shop Analysts and Schedulers," brought suit in the United States District Court for the District of Columbia, alleging that certain action taken with respect to them violated their rights under that section. The District Court granted declaratory relief, and the Government has appealed.

I.

The background of the case is this:

In 1950, the Bureau of Ships, Department of the Navy, set up a "Production Planning and Control" system for altering, repairing and maintaining naval vessels at each Navy Yard. Upon notification that a vessel was coming in for alterations or repair, those employees in the Planning Division of the Navy Yard, having the rating of "Planner and Estimator" (P&E) drew up job orders for all the work to be done to the vessel in accordance with plans or design specifications, made estimates of cost, procured materials, and prepared planning schedules for the work.

The job orders then went to the Shop, or Production Department, of the Yard. There employees with the rating of "Shop Analyst and Scheduler" (A&S), whose duties were to serve as staff assistants to the Master Mechanic of the Yard, took the job order received from the Planning Division, broke it down in greater detail into the various job operations required, made their own cost estimates, scheduled the work by operations, kept an eye on its progress and on workloads, and in general established the controls over the Shop's production. The A&S position carried a lower rating and salary that the P&E position.

In 1959 the Navy Department began a reorganization—not yet completed—of the existing Production Planning and Control system. The reorganization was directed toward abolishing the duplication and repetition of effort, and cutting the costs and excessive paperwork, involved in the existing system. It abolished the A&S position, and assigned to the Planners and Estimators of the Planning Division the duty of putting the job order into the greater detail needed for scheduling work in the Production Department. A new position denominated "Shop Planner" was created in the Production Department to perform the shop planning duties which remained after the assignment to the P&E position of the duty of preparing detailed job orders. Employees with the A&S rating were given the opportunity to take an examination for the higher P&E rating, and those who passed the examination have been given the P&E rating and salary. Others with former A&S ratings are being assigned to other jobs for which they are qualified, such as "Shop Planner."

The twelve plaintiffs-appellees are former A&S employees who did not pass the test for the P&E rating.[1] Being entitled to the rights given by the Veterans Prefer-

[1] They were among those reassigned and now hold other jobs with the Navy Department.

ence Act, they appealed to the Civil Service Commission, limiting their claim by stipulation to the contention that a "transfer of function" to the Planning Division of each Navy Yard occurred when the A&S positions were abolished, within the meaning of Section 12 of the Veterans Preference Act, 58 STAT. 390, 5 U.S.C. § 861 (1958). That section provides in pertinent part:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: *Provided . . . And provided further*, That when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies, all preference employees in the function or functions transferred or in the agency which is replaced by some other agency shall first be transferred to the replacing agency, or agencies, for employment in positions for which they are qualified, before such agency, or agencies, shall appoint additional employees from any other source for such positions."

Urging that a transfer of function had occurred, plaintiffs asserted before the Commission that they were entitled under the Act to be transferred along with their job "function" to the P&E position, without test and with seniority rights. The Commission, for reasons we will later discuss, ruled adversely to them. This litigation followed.

II.

Turning first to the text of Section 12 of the Veterans Preference Act of 1944, it is clear that Congress was primarily concerned with the problems caused by major government reorganizations. The section speaks of the situation arising "when any or all of the functions of any agency are transferred to, or when any agency is replaced by, some other agency, or agencies . . . ." This was a

situation which had frequently arisen in the years just prior to 1944. Under the authority of the Reorganization Act of 1939,[3] the President had on numerous occasions abolished or curtailed the activities of a particular agency, transferring its duties to one or more other agencies—already existing or newly created—in the interest of increased efficiency and economy in governmental operations.[4] The Reorganization Act of 1939 provided, *inter alia*, in Section 4, 53 STAT. 562, for the "transfer of the whole or any part of any agency or the functions thereof to the jurisdiction and control of any other agency;" or "the abolition of the whole or any part of any agency" whose functions have been or will be "terminated" or transferred. The word "functions" was not expressly defined, but was evidently used in the sense of "authority, powers, and duties" (see Section 8(b), 53 STAT. 563), when "expressly authorized by law" (see Section 3(f), 53 STAT. 562).[5]

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[3] 53 STAT. 561-65, approved April 3, 1939. See also Act of June 30, 1932, 47 STAT. 413.

[4] Reorganization plans promulgated under the Reorganization Act of 1939 are reproduced in the notes to 5 U.S.C.A. § 133t (Cum. Supp. 1950).

[5] The cited sections provide:

"SEC. 8. . . .

"(b) No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any *transfer of authority, power, and duties from one officer or agency of the Government to another* under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the

The Reorganization Act of 1939, in Section 4(d) (2), 53 STAT. 562, required the President to "make provision for the transfer or other disposition of the . . . personnel affected . . ." by a plan. In Section 10, 53 STAT. 563, a limited measure of job protection was given to the affected personnel.[5]

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head of the agency or other officer of the United States to whom the *authority, powers, and duties* are transferred." (Emphasis supplied.)

"SEC. 3. No reorganization plan under section 4 shall provide—

* * * *

"(f) For authorizing any agency to exercise any function which is not expressly authorized by law."

For one example, among many, of the use of the word "functions" in reorganization plans, see Reorganization Plan No. III, 5 FED.REG. 2107, 54 STAT. 1231, which provided in part:

"CIVIL AERONAUTICS AUTHORITY

"SEC. 7. *Functions of the Administrator Transferred.*—The functions vested in the Civil Aeronautics Authority by the Civilian Pilot Training Act of 1939; the functions of aircraft registration and of safety regulation described in Titles V and VI of the Civil Aeronautics Act of 1938, except the functions of prescribing safety standards, rules, and regulations and of suspending and revoking certificates after hearing; the function provided for by Section 1101 of the Civil Aeronautics Act of 1938; and the functions of appointing such officers and employees and of authorizing such expenditures and travel as may be necessary for the performance of all functions vested in the Administrator, are transferred from the Civil Aeronautics Authority to and shall be exercised by the Administrator, who shall hereafter be known as the Administrator of Civil Aeronautics."

[5] Section 10 provided:

"SEC. 10. (a) Whenever the employment of any person is terminated by a reduction of personnel as a result of a reorganization effected under this title, such person shall thereafter be

When the bill which became the Veterans Preference Act of 1944 was under consideration, veterans' groups asked for a greater measure of job protection in reorganizations. Mr. Flemming, Chairman of the Civil Service Commission, and Congressman Starnes, author of the bill, spoke as follows:

"Mr. Flemming: It [the bill] does not guarantee a job. It simply provides, if there is a transfer of that kind, that the agency to which the functions have been transferred cannot go out into the open labor market to recruit people until they have placed all preference eligibles who are qualified for positions in that agency.

"Mr. Starnes: That is one principle the veterans' organizations have fought for most vigorously. Oftentimes they have found agencies which have transferred or abolished their functions entirely and a new agency was set up in its place. The new agency then would leave the veterans in the cold and go out into the open labor market and recruit new appointees. It is a device which the veterans claim have been used against them to eliminate them from Government appointments, by simply abolishing the function or transfer the function and leaving the personnel out in the cold. That is one practice of ignoring veterans' perference." (Hearings on H.R. 4115, 78th Cong., 2d Sess., before the Senate Committee on Civil Service, May 19, 1944, p. 10)

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given preference, when qualified, whenever an appointment is made in the executive branch of the Government, but such preference shall not be effective for a period longer than twelve months from the date the employment of such person is so terminated.

"(b) Any transfer of personnel under this title shall be without change in classification or compensation, except that this requirement shall not operate after the end of the fiscal year during which the transfer is made to prevent the adjustment of classification or compensation to conform to the duties to which such transferred personnel may be assigned."

The congressional purpose was thus to protect veterans who were affected by transfers of functions from one agency to another, and the term "functions" was evidently to have the same meaning ("authority, powers, and duties") as under the Reorganization Act of 1939. Nothing in the statute or the legislative history refers to similar transfers within a single agency.[6] The regulation adopted by the Civil Service Commission in 1944 to implement Section 12 simply copied the statutory language, and spoke only of transfers between agencies. See Section 20.8 of the Regulations, 5 C.F.R. § 12.306 (1944 Supp.); 5 C.F.R. § 20.8 (1961). However, in 1954, the Commission decided that the statute and Section 20.8 of the Regulations also applied to transfers of functions within a single agency. Under date of January 12, 1954, it sent Departmental Circular No. 740 to the heads of all agencies, advising them of its conclusions. Later, on May 19, 1959, the General Counsel of the Commission rendered an opinion concerning the problems "brought about by the disestablishment of the Corpus Christi Naval Overhaul and Repair Facility," with special reference to the interpretation of Section 12 of the Veterans Preference Act. Finally, under date of June 23, 1960, the Commission issued Supplement No. 2 to Departmental Circular 740, further defining its position as to the application of Section 12.

The personnel actions complained of here took place on or about November 17, 1959. Appellees argue that only the reguluations promulgated prior to that date, together with the statute, can be considered in determining the le-

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[6] It would, perhaps, have been surprising if the Act had attempted to deal with intra-agency transfers, since the prevailing philosophy appears to have been that agency functions should vest in the head of an agency, subject to being delegated by him to any chosen subordinate or agency division. See, for example, the quotation from Reorganization Plan No. III, *supra* note 4.

gality of the action taken. Assuming for present purposes (as did the Commission) that this is so, we note first that the statute and the 1944 regulation (Section 20.8) deal only with transfers of functions between agencies, and have no direct bearing on the present case—unless the word "agency" is given some meaning not apparent on the face of the statute. We come, then, to the 1954 Departmental Circular, in which for the first time the Commission ruled that Section 12 applied to transfers within an agency. It did this by construing "agency," as used in Section 12, as including "an entire independent establishment, a bureau, branch, division, section, or smaller organizational entity." The Commission went on to say:

> "The applicability of Section 20.8(a) depends upon a judgment as to whether, in conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organizational entity. If such is found to be the case, then the incumbent or incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions prior to any reduction-in-force action which might otherwise affect them."

No effort, however, was made to define or explain what was meant by the terms "function" or "functions."

III.

We turn now to the administrative rulings made in the present case.

As we have noted, after the action of the Navy Department in abolishing the A&S position in 1959, appellees brought their case before the Civil Service Commission.

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[7] The Government offers no challenge to the power of the Commission to propound this broader rule, and for present purposes we assume the power existed.

The Chief Appeals Examining Officer, after hearing, concluded on the evidence before him that there had not been a transfer of functions within the meaning of the statute and the regulations in force on November 17, 1959.[8] He also held against the employees on an alternative ground:

> "Even if the contention of the attorney for the appellants is correct that some act of transfer was required, Section 20.8 of the Commission's regulations would require that the transfer of Shop Analysts and Schedulers be accomplished without change in tenure of appointment. In other words, they would have arrived in the Planning Division as Shop Analysts and

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[8] His opinion stated in pertinent part:

> "Neither the statute or regulations cited provide that a specific duty or task is a function per se. The word function is not defined in the law or the regulations and it seems to us that a function is more or something different from the duties or tasks that might be assigned to a particular position.
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> * * * * * * *
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> "In the instant case, we have a situation where the Planner and Estimator has been directed to make a more detailed job order than the one he made heretofore. This eliminates the necessity for the Shop Analyst and Scheduler to prepare the detailed job order.
>
> "Thus, we are brought to the question—was the preparation of this detailed job order the function of the Shop Analyst and Scheduler?
>
> "We think not. The Production Control Manual clearly describes the function of the Shop Analyst and Scheduler. He is, or was, the staff assistant to the Master Mechanic in the Shop.
>
> "It seems to us that if we were to find that such a function had been transferred we would have to find some person in the Planning Division who was now performing the function of staff assistant to the Master Mechanic. As we noted hereinbefore, the function of the staff assistant did not consist solely of preparing more detailed job orders.
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> "Thus, we find no transfer of functions has occurred . . . ."

Schedulers and in a reduction in force they would have no right to promotion to the positions of Planners and Estimators.

"In short, the result would have been exactly the same as the present action if the Department of the Navy followed the method advocated by the attorney for the appellants; a reduction in force among Shop Analysts and Schedulers."

Appeal was then taken to the Board of Appeals and Review. However, the Civil Service Commission decided to review the case itself. It held adversely to the employees in a final decision rendered on December 7, 1960.

The Civil Service Commission took the view that "in reality the primary work of the Planners and Estimators and the primary work of the Shop Analysts and Schedulers were, prior to the reorganization, operating parts of a single function and not independent and separable function." Thus, it said, "no transfer of function occurred . . . ."[9]

[9] To quote the Commission:

"As to the facts, the Commission finds from the evidence of record that the function, the identity of which is the prime issue in this appeal was, and still is, the maintenance of planning and production control in each Naval Shipyard. The Commission further finds that, whereas prior to the reorganization, the planning and production control function operated with the Planners and Estimators furnishing broad outlines of the repair and maintenance work to be performed at the Shipyards, with the Shop Analysts and Schedulers following through with more detailed instructions on the same work orders the function has, since the reorganization, been so rearranged that the preparation of the detailed instructions formerly supplied by the Shop Analysts and Schedulers has been assigned to Planners and Estimators. The evidence also discloses that the Planners and Estimators have, prior to and since the formal inception of the production control system, performed work the substance of which has been preliminary to

We think these conclusions of the Commission are solidly based in the evidence, are consistent with the applicable law and regulations, and are in accord with the interpretation and understanding of the term "function" under the Reorganization Act of 1939. The Analysts and Schedulers were individual workers, assigned as staff assistants to the Master Mechanic of the Yard. They were not an "organizational entity" within the Commission's definition of the statutory term "agency," as used in its 1954 regulation (Section 20.8). Nor did the Planners and Estimators constitute such an entity. The transfer which occurred was not the transfer of the functions of an "agency," as defined by the Commission, but the transfer of certain job duties of individual workers, or, perhaps more correctly, of a class or grade of individual workers, to workers of another class or grade.[10]

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and related to the work performed by the Shop Analysts and Schedulers, all of which work was and is identified with the planning and production control function in each Naval Shipyard. In reality the primary work of the Planners and Estimators and the primary work of the Shop Analysts and Schedulers were, prior to the reorganization, operating parts of a single function and not independent and separable functions. As a result of the reorganization the operating parts of the Shipyards' planning and production control system were streamlined to eliminate one of the parts that was found to be superfluous, i.e. the Shop Analysts and Scheduler rating. In view of the above findings of fact, The Commission agrees with and affirms the conclusion of the Appeals Examining Office that no transfer of function occurred in the various Shipyards as a result of the reorganization so as to entitle the Shop Analysts and Schedulers to move into the Planning Departments where the Planner and Estimator positions were located before a reduction in force could ensue."

[10] Appellees rely on a passage in the 1954 regulation, to the following effect:

"The rights of the employees involved can be illustrated as follows:

Though the Commission did not refer to or discuss the alternate ground of decision relied on by the Chief Appeals Examining Officer, we think that ground has considerable merit. The P&E rating was higher than the A&S rating. In a reduction in force, persons in each grade or rating compete with others in that grade: the process does not permit persons in lower grades to compete at a higher level and thus gain a promotion. A transfer followed by a reduction in force, as desired by the appellees, would thus appear to gain them little or nothing. Cf. *Powell* v. *Brannan*, 91 U.S.App.D.C. 16, 196 F.2d 871 (1952); *Cutting* v. *Higley*, 98 U.S.App.D.C. 288, 235 F.2d 515, cert. denied, 352 U.S. 883 (1956). The Navy Department, as we have noted, has provided an opportunity to appellees to qualify for the higher P&E rating, by examination. It has

> "EXAMPLE A: All the functions of Section X in Division Y in a Federal Department are being transferred to Division Z in the same Department. Division Y and Division Z are both in the same commuting area. Section X is composed of 100 employees, but after the transfer of functions there will be fifty surplus positions in Division Z.
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> "*Step 1*—Any employees in Section X who will otherwise be involuntarily separated or demoted must be offered the opportunity to follow the functions. Employees who do not accept may be separated under Part 9 or Part 22 of the Commission's Regulations.
>
> "*Step 2*—A reduction in force situation exists in Division Z and the Retention Preference Regulations relating to reduction in force must be applied. Employees reached for separation or demotion have reassignment and retreat rights as employees of Division Z. Separated career employees are placed on the reemployment priority list and receive full benefits of the program for separated career employees (displacement, priority referral, and priority certification)."

Appellees' reliance on this example seems misplaced. "All the functions" of a section were not transferred in the present case: some of the duties of particular workers no doubt were.

also offered other jobs to appellees. We do not think that the law required it to do more.

For these reasons, the cause will be remanded to the District Court with directions that the judgment for the appellees be vacated and the motion of appellants for summary judgment be granted.

So ordered.

APPENDIX B

The Navy Civilian Personnel Instruction applicable to Reductions in Force provides in pertinent part:

INSTRUCTION 170

REDUCTIONS IN FORCE

SECTION 1. LEGAL BASIS

. . . . . .

1-1. VETERANS' PREFERENCE ACT.—The Veterans' Preference Act of 1944 (58 Stat. 387; 5 USC 851-869), as amended, is the basic law governing reduction in force. Section 12 of this Act specifically prescribes reduction-in-force criteria. Sections 11 and 19 of the Act authorize and direct the Civil Service Commission to issue and enforce regulations to carry out the provisions, intent and purpose of the Act. Section 19 also provides that agencies must comply with decisions of the Commission. Sections 11, 12 and 19 are quoted in NCPI 170. 11-Encl. 1.

SECTION 4. BASIC FACTORS IN REDUCTION IN FORCE

. . . . . .

4-1. COMPETITIVE AREAS.

(2) *Naval activity (field service).*—In the field service the following will be considered as naval activities:

(b) Naval Shipyard.

SECTION 9. PROCEDURES FOR SPECIAL CIRCUMSTANCES

. . . . . .

9-4. TRANSFER OF FUNCTIONS.—The term service as used herein shall include each military department of the Department of Defense and the Office of the Secretary of Defense:

a. From or to another Federal agency, service of the Department of Defense or naval activity.—When functions are transferred from one location to

another all of the Retention Group I, II and III employees involved shall be transferred with the functions. The same action shall be taken whether the transfer is between Federal agencies, services of the Department of Defense or naval activities. The tenure of employees transferred shall not be changed regardless of whether they are in a duty or nonduty, pay or nonpay status.

b. Policy.—The policy outlined in (1) through (4) below was established by the Department of Defense for the purpose of assuring equitable and uniform treatment of employees when functions to which they were assigned are transferred from one service of the Department of Defense to another, or from one naval activity to another. The same criteria shall apply when functions are transferred to a different location within the same activity. They will apply also to similar actions involving transfer from or to another Government agency when not inconsistent with any provision of law or agreement relating to a particular transfer or consolidation:

(1) The work being performed by one service or naval activity is to be taken over by another service or naval activity. This will be considered a transfer of function if there is reasonable expectation that the work being transferred will continue for more than 60 days.

(2) The work of one service or naval activity is simply being cancelled and no corresponding function is being assumed by another service or naval activity. This will result in a reduction in force solely by the service or naval activity whose work is cancelled.

(3) A combination of transfer of some continuing functions and a cancellation to be taken will depend upon the separability of the two groups of functions. When it is not possible to differentiate between personnel working on that portion of the work subject to reduction in force due to cancellation of work and that portion being transferred, the entire action will be handled as a transfer of function.

(4) One service or naval activity is transferring real property to another service or naval activity, but not the work being performed on that property. The work of the employees directly engaged in the custody and maintenance of the real property will be considered to have been transferred to the receiving service. Employees other than those directly and primarily engaged in the custody, protection and maintenance of the real property do not have regulatory rights to consideration for transfer. However, to the maximum extent possible in hiring to meet its requirements, the gaining service will give priority consideration to the employees of the losing service.

c. Identifying positions with transfer of functions.— It is necessary to make a determination as to which, if any, positions or units are identifiable with work that is to be transferred to a different location. This determination must be made whether the work is being transferred to a different location within the activity, to another naval activity or to a different service in the Department of Defense. Transfers between activities or services should be made by, or with the concurrence of the Bureaus concerned. Should management bureaus or offices concerned fail

to reach agreement, the case will be forwarded to the Assistant Secretary of the Navy (Personnel and Reserve Forces) for final resolution. The determination should be made sufficiently in advance to meet notice requirements of any related reduction-in-force action or separation of employees who decline offer to move with their functions. The following criteria in addition to those outlined in *b* above will be used to make the determination:

(1) Certain duties of one or more positions are to be transferred while the unit performing the functions to be transferred will remain intact to perform remaining functions. If the majority of the duties of a position are to be transferred to another service or naval activity, the incumbent will be identified with the transfer of functions. However, if grade-controlling duties are involved the employee's rights will be based on the location of the higher grade duties rather than the majority of duties.

(2) Employees whose positions are being abolished because the function is being transferred to another Service or naval activity enjoy transfer of function rights even though no additional personnel are required by the Service or activity acquiring the function.

(3) When the majority of an employee's duties are being transferred to more than one location his transfer or function rights are dependent upon the planned location of the largest portion of his duties unless grade-controlling duties are involved (see (1) above). If a determination cannot be made as to which activity will receive a majority of

the duties (or grade-controlling duties) the employee will be identified with one of the activities by administrative determination.

(4) An employee providing service or support to an organization being transferred is to be identified with the transfer of functions if it is determined that more than half of his duties are devoted to the organization being transferred. For example, a Public Works Laborer Cleaner is assigned to clean offices in a Division of another Department that is being transferred. The Laborer Cleaner would be identified with the transfer.

APPENDIX C

Regulations of the Civil Service Commission

The following are pertinent excerpts taken from the complete text at R. 138-142:

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON 25, D. C.

January 12, 1954

DEPARTMENTAL CIRCULAR NO. 740
TO HEADS OF DEPARTMENTS AND INDEPENDENT ESTABLISHMENTS

SUBJECT: Application of Retention Preference Regulations to a Transfer of Functions.

A. *Application of Section 20.8 (a) of the Regulations*

In connection with a recent action, the Commission thoroughly considered the intent of that provision of Section 12 of the Veterans' Preference Act of 1944, as amended, relating to transfers of functions. Heretofore, this provision of law and the Civil Service Regulations implementing it have been held to apply only to transfers of functions between Federal Departments or Independent Agencies. The Commission has ruled that Section 12 of the Veterans' Preference Act and thus Section 20.8 (a) of the Civil Service Regulations also apply to transfers of functions within a Federal Department or Independent Agency. The Commission also ruled that the provisions of Section 20.8 (b) do not apply when there is a transfer of functions from one organizational unit to another and the first unit is abolished.

This action of the Commission defines "agency", as used in the third proviso of Section 12 of the Veterans' Preference Act and in Section 20.8 (a) of the Civil Service Regulations. An "agency", in this context, could be an entire

independent establishment, a bureau, branch, division, section, or smaller organizational entity. The applicability of Section 20.8 (a) depends upon a judgment as to whether, in conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organizational entity. If such is found to be the case, then the incumbent or incumbents of positions engaged in the transferred functions must be given the opportunity to follow the functions prior to any reduction-in-force action which might otherwise affect them.

The rights of the employees involved can be illustrated as follows:

EXAMPLE A: All the functions of Section X in Division Y in a Federal Department are being transferred to Division Z in the same Department, Division Y and Division Z are both in the same commuting area. Section X is composed of 100 employees, but after the transfer of functions there will be fifty surplus positions in Division Z.

Step 1—Any employees in Section X who will otherwise be involuntarily separated or demoted must be offered the opportunity to follow the functions. Employees who do not accept may be separated under Part 9 or Part 22 of the Commission's Regulations.

Step 2—A reduction in force situation exists in Division Z and the Retention Preference Regulations relating to reduction in force must be applied. Employees reached for separation or demotion have reassignment and retreat rights as employees of Division Z. Separated career employees are placed on the reemployment priority list and receive full benefits of the program for separated career employees (displacement, priority referral, and priority certification).